

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**JAMES A. COOK, Appellant**

**and**

**DEPARTMENT OF THE NAVY, PUGET  
SOUND NAVAL SHIPYARD, Bremerton, WA,  
Employer**

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**Docket No. 05-217  
Issued: February 16, 2006**

*Appearances:*

*John Goodwin, Esq., for the appellant  
Office of Solicitor, for the Director*

Oral Argument Held January 11, 2006

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge

**JURISDICTION**

On October 26, 2004 appellant filed a timely appeal of an Office of Workers' Compensation Programs' decision dated October 13, 2004 reducing appellant's compensation benefits on the grounds that he had the capacity to earn the wages of a security guard. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits of this case.

**ISSUE**

The issue is whether the Office properly reduced appellant's benefits effective October 13, 2004, on the grounds that he was no longer totally disabled, but rather was partially disabled and had the capacity to earn wages as a security guard at the rate of \$335.60 per week.

**FACTUAL HISTORY**

On October 28, 1992 appellant, a 44-year-old machinery mechanic, filed an occupational disease claim for carpal tunnel syndrome. The Office accepted appellant's claim for bilateral carpal tunnel syndrome and left cubital tunnel syndrome on June 22, 1993.

In a report dated May 14, 1996, Dr. Larry D. Iversen, a Board-certified orthopedic surgeon, recommended that appellant be permanently restricted from using vibrating tools or equipment and from doing any lifting, pushing or pulling over 40 pounds.

Appellant returned to light duty and subsequently received schedule awards for a 19 percent impairment of his left upper extremity and a 10 percent impairment of his right upper extremity.<sup>1</sup>

Having been notified that the employing establishment could no longer provide him with light-duty employment, appellant filed a claim for recurrence of disability on January 4, 2002. The Office accepted appellant's recurrence claim on April 4, 2002 and sought a second opinion medical examination to determine appellant's capacity to participate in vocational rehabilitation.

In a report dated February 18, 2003, Dr. Bays found no significant objective physical findings and opined that appellant was able to perform the activities of daily living with no significant restrictions.

Finding a conflict between the opinions of Drs. Bays and Staker, the Office referred appellant to Dr. Peterson for an impartial medical examination. In a report dated May 15, 2003, he provided impressions of bilateral carpal tunnel syndrome with residual wasting; left cubital tunnel syndrome with residual wasting, no sensory changes and bilateral chondromalacia. Dr. Peterson's examination revealed grip measurement on the right to be 55 pounds, 40 pounds and 50 pounds sequentially, and on the left to be 70 pounds, 65 pounds and 65 pounds sequentially. He found that appellant had a full grip with the fingers and minimal to no wasting of the thenar muscles. Dr. Peterson stated that appellant had a positive Tinel's and Phalen's and decreased sensation in the thumb and index fingers, but no decreased sensation over the long finger or the ulnar finger. He indicated that there was two-point discrimination on the right at eight to nine millimeters (mm) and on the left at seven to eight mm. Dr. Peterson opined that appellant should not engage in a job requiring the use of vibratory tools or equipment and should avoid heavy lifting, pushing or pulling over 40 pounds. He also opined that, although appellant did have ongoing carpal tunnel symptoms, he did not have significant impairment due to his chondromalacia patellae and could perform activities of daily living.

By letter dated June 16, 2003, the office asked Dr. Peterson to complete a work capacity evaluation form, considering all current diagnoses, whether work related or not.

In a work capacity evaluation dated July 1, 2003, Dr. Peterson indicated that appellant was limited to two hours of pushing, pulling and lifting. He also stated that the maximum number of pounds that could be handled by appellant when pushing, pulling or lifting was 15 pounds.

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<sup>1</sup> The Office obtained a second opinion evaluation from Dr. Lynn Staker in conjunction with appellant's request for a schedule award. Although Dr. Staker referred to Dr. Iversen's recommended restrictions, she did not offer an opinion regarding those restrictions. It should be noted that the Office referred appellant to a referee medical examiner, Dr. Charles Peterson, a Board-certified orthopedic surgeon, to resolve a conflict between the opinions of Dr. Staker and Dr. Patrick Bays, a Board-certified orthopedic surgeon.

The Office referred appellant for vocational rehabilitation on August 22, 2003. A number of tests were conducted to determine appellant's ability to perform certain jobs. As a result of the testing and based upon appellant's education, medical restrictions and a labor market survey, the vocational rehabilitation counselor identified three positions that would accommodate appellant's medical restrictions and abilities and that they were reasonably available in the commuting area, namely security guard, parking lot attendant and courier. The position description for the light-duty position of security guard reflected that the job required strength levels of no more than 20 pounds. In a closing report dated April 2, 2004, the vocational rehabilitation counselor indicated that, although appellant was provided with numerous job announcements, he chose not to apply for the jobs and participated only marginally in searching for employment. The counselor recommended closing vocational services, stating that appellant could be considered employable as a security guard, delivery driver or parking lot attendant and that several jobs existed in his commutable area.

On June 3, 2004 the Office issued a notice of proposed reduction of compensation. The Office included a copy of the position description of security guard. Informing him that the position of security guard was within his work restrictions and that the vocational counselor had certified that the position was reasonably available within his commuting area, the Office advised appellant that it proposed to reduce his compensation based on the amount of wages he could be earning in that position. Appellant was given 30 days to respond to the proposed reduction.

In an undated letter received by the Office on June 16, 2004, appellant's representative stated that "the job of security guard is not suitable because Mr. Cook cannot do the duties as listed in the DOT job description of security guard."

By decision dated October 13, 2004, the Office finalized its decision to reduce appellant's benefits, based on a finding that he was capable of performing the duties of security guard.

On appeal, appellant contends that the requirements of the light-duty position of security guard exceed the July 1, 2003 restrictions outlined by Dr. Peterson, which the Office accepted as best representing appellant's capabilities. He argues that Dr. Peterson stated that appellant could not lift anything in excess of 15 pounds; whereas, a light-duty position by definition requires a worker to lift 20 pounds. Appellant argues that the job is not suitable, in that he is not capable of performing the duties of the job.

### **LEGAL PRECEDENT**

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury, it has the burden of justifying a subsequent reduction of compensation benefits.<sup>2</sup>

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<sup>2</sup> *Sherman Preston*, 56 ECAB \_\_\_\_ (Docket No. 05-721, issued June 20, 2005).

Under section 8115(a) of the Federal Employees' Compensation Act,<sup>3</sup> wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, his wage-earning capacity is determined with due regard to the nature of his injury, his degree of physical impairment, his usual employment, his age, his qualifications for other employment, the availability of suitable employment and other facts and the circumstances which may affect his wage-earning capacity in his disabled condition.<sup>4</sup> Wage-earning capacity is a measure of the employee's ability to earn wages in the open labor market under normal employment conditions.<sup>5</sup> The job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.<sup>6</sup>

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to a vocational rehabilitation counselor authorized by the Office or to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open labor market, that fits the employee's capabilities with regard to his physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employment service or other applicable service.<sup>7</sup>

When the opinion of an impartial medical specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report. When the impartial medical specialist's statement of clarification or elaboration is not forthcoming or if the specialist is unable to clarify or elaborate on the original report or if the specialist's supplemental report is also vague, speculative or lacks rationale, the Office must submit the case record together with a detailed statement of accepted facts to a second impartial specialist for a rationalized medical opinion on the issue in question.<sup>8</sup> Unless this procedure is carried out by the Office, the intent of section 8123(a) of the Act will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.<sup>9</sup>

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<sup>3</sup> 5 U.S.C. §§ 8101-8193.

<sup>4</sup> See *Mary E. Marshall*, 56 ECAB \_\_\_\_ (Docket No. 04-1048, issued March 25, 2005); *James Smith*, 53 ECAB 188 (2001).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Sherman Preston*, *supra* note 2.

<sup>8</sup> See *Nathan L. Harrell*, 41 ECAB 402 (1990).

<sup>9</sup> *Harold Travis*, 30 ECAB 1071 (1979).

### **ANALYSIS**

The Board finds that this case is not in posture for a decision due to an inconsistency in Dr. Peterson's reports. Accordingly, this case must be remanded to the Office in order to obtain a supplemental report clarifying Dr. Peterson's opinion.

Based upon Dr. Peterson's July 1, 2003 restrictions, the Office reduced appellant's benefits, finding that he was capable of performing the duties of a security guard, which requires strength levels of no more than 20 pounds. However, the exact nature of the recommended restrictions is unclear. In a narrative report dated May 15, 2003, Dr. Peterson opined that appellant should not engage in a job requiring the use of vibratory tools or equipment and should avoid heavy lifting, pushing or pulling over 40 pounds. However, in a July 1, 2003 work capacity evaluation form, Dr. Peterson indicated that the maximum number of pounds that could be handled by appellant when pushing, pulling or lifting was 15 pounds. The Board finds that the discrepancy between Dr. Peterson's reports requires clarification, in order for the Board to render a fair and impartial decision.

On appeal, appellant's representative argues that Dr. Peterson's reports are not inconsistent. He contends that the May 15, 2003 narrative report addresses limitations relating to appellant's wrist conditions; whereas, at the request of the Office, the July 1, 2003 work capacity evaluation takes into consideration appellant's accepted wrist conditions, as well as his bilateral chondromalacia.<sup>10</sup> The Board finds that a supplemental report is necessary in order to resolve the issue.

The Board will set aside the Office's October 13, 2004 decision and remand the case for a supplemental report from Dr. Peterson. After such further development of the medical evidence as may be necessary, the Office shall issue an appropriate final decision on appellant's wage-earning capacity.

### **CONCLUSION**

Due to inconsistencies in Dr. Peterson's May 15, 2003 narrative report and his July 1, 2003 work capacity evaluation, this case must be remanded to the Office in order to obtain a supplement report clarifying Dr. Peterson's opinion.

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<sup>10</sup> Appellant was granted a schedule award for permanent partial impairment to his lower extremities on November 2, 2002.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated October 13, 2004 is set aside and remanded for action consistent with this opinion.

Issued: February 16, 2006  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board